No. 78-1642

In the Supreme Court of the United States

OCTOBER TERM, 1978

ST. REGIS PAPER COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 591 F. 2d 612 (Pet. App. 1a-7a). The opinion of the district court is reported at 14 F.E.P. 1641 (Pet. App. 8a-12a).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1979. The petition for a writ of certiorari was filed on April 27, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal contractor subject to the provisions of Exec. Order No. 11246 and its implementing regulations is required to exhaust available administrative remedies before filing suit in court to challenge any such regulation

and its application to the contractor, where the contractor has not shown that it will lose government contracts or suffer other irreparable injury during the pendency of the available administrative proceeding and where the outcome of that proceeding may make judicial relief unnecessary.

STATEMENT

Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), and Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978),[1] requires those who contract or subcontract with the federal government to agree as part of their contractual undertakings not to engage in employment practices that discriminate on the grounds of race, sex, religion or national origin.[2] Those contractors or subcontractors who have fifty or more employees and a contract of more than $50,000 must agree to act affirmatively to ensure that employees and applicants for employment are treated in a non-discriminatory fashion (41 C.F.R. 60-1.40(a), 43 Fed. Reg. 49247-49248 (1978)).[3] In addition,

[1]Exec. Order No. 11246 as amended is reprinted as Appendix C to the petition (Pet. App. 13a-26a).

[2]Executive orders prohibiting discrimination by federal contractors and subcontractors on grounds of race, religion, color and national origin were first promulgated by President Roosevelt and have been in effect continuously since 1948. For a history of those orders, see *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 168-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[3]On October 20, 1978, the Office of Federal Contract Compliance Programs amended its regulations implementing Exec. Order No. 11246 to take account of the 1978 amendments to the Order (43 Fed. Reg. 49240), and corrective amendments were issued on October 31, 1978 (43 Fed. Reg. 51400). Unless otherwise noted, the citations in this brief are to the amended regulations as they appear in the Federal Register.

under Section 202(4) of the Executive Order, all contracts, except those in certain exempt categories, must contain provisions requiring the contractor to comply with the regulations of the Secretary of Labor implementing the Executive Order. The Secretary's regulations call for the enforcement of the Executive Order through, *inter alia*, an administrative process that includes a full hearing before an administrative law judge, who submits a recommended decision to the Secretary or other agency officer responsible for the formulation of a final agency order. See 41 C.F.R. 60-1.26(c) (43 Fed. Reg. 42946 (1978)), 41 C.F.R. 60-30 *et seq.* (43 Fed Reg. 49259-49264, 51401 (1978)). Judicial review of such orders is available under 28 U.S.C. 1331(a) and the Administrative Procedure Act, 5 U.S.C. 704. Exec. Order No. 11246 is now enforced by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor; at the time the underlying controversy arose, it was enforced both by the OFCCP and by various federal agencies designated as contract compliance agencies.[4]

[4]Exec. Order No. 11246, as amended, delegates responsibility for administering and enforcing contractors' equal employment agreements to the Secretary of Labor (Section 201) but provides that the Secretary may redelegate his functions under the Order to any other executive agency (Section 401). The Secretary has delegated the administration of the Order to the Director of the Office of Federal Contract Compliance Programs (OFCCP), an office within the Department of Labor (41 C.F.R. 60-1.2 (43 Fed. Reg. 49241 (1978)). Prior to the issuance of Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978), amending Exec. Order No. 11246, and at all times relevant to this case, the Director of the OFCCP was authorized to designate various federal agencies as "compliance agencies" having primary responsibility for enforcing Exec. Order No. 11246. See 41 C.F.R. 60-1.3, 60-1.6 (1975). Exec. Order No. 12086 has now centralized enforcement (in addition to administration) of Exec. Order No. 11246 within the Department of Labor.

Petitioner, a major producer of lumber, lumber products, paper and related products, has entered into a substantial number of contracts with the federal government containing the required non-discrimination and affirmative action provisions (Pet. 3). In February 1976 the General Services Administration (GSA), the agency then charged with ensuring that petitioner adhered to its contractual obligations under Exec. Order No. 11246, conducted a compliance review at petitioner's plant in Libby, Montana.[5] GSA determined that petitioner had breached its agreements under the Executive Order program by failing to hire female applicants for laborer positions and by failing to make a good faith effort to increase the number of women it employed. On March 22, 1976, GSA issued a show cause notice informing petitioner that, if it did not correct its violations within 30 days or show cause for its failure to do so, GSA would commence proceedings to enforce petitioner's obligations under the Executive Order (Appendix A, *infra*, 1a-2a). In accordance with 41 C.F.R. 60-2.2(b) (1975), the notice also advised petitioner that "St. Regis Paper Company can be found non-responsible to perform any government contract until this show cause notice is finally and favorably resolved" (Appendix A, *infra*, 2a).

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[5]The primary method of enforcing the Executive Order and its implementing regulations is the conduct of compliance reviews, in which the contractor's employment practices and policies and the resulting employment conditions are analyzed (41 C.F.R. 60-1.20(a) and (b) (43 Fed. Reg. 49245 (1978)). If a contractor fails to comply with its Executive Order obligations, its contracts may be cancelled, terminated or suspended, and the contractor may be debarred, *i.e.*, declared ineligible for further government contracts (Exec. Order No. 11246, Section 209(a)(5) and (a)(6)). Suits by the Department of Justice to enforce the contractual obligations are also contemplated as an alternative enforcement procedure (*id.* at Section 209(a)(2); 41 C.F.R. 60-1.26(e) and (f) (43 Fed. Reg. 49247 (1978)).

If it came to the attention of a federal contracting officer that a contractor—bidder was not in compliance with the Executive Order or its implementing regulations, he could declare the bidder nonresponsible and therefore ineligible to receive a new contract even if it were the the low bidder; the contracting officer could simply "pass over" the low-bidding contractor in awarding the contract (41 C.F.R. 60-2.2(b) (1975)). Under the applicable regulations, however (*ibid.*), petitioner was entitled to request a hearing prior to a determination of nonresponsibility, if the proposed determination of "nonresponsibility" "raise[d] substantial issues of law or fact." In accordance with this procedure, on April 6, 1976, petitioner requested the Director of the OFCCP to require that it be afforded a hearing prior to an agency determination of nonresponsibility (Pet. App. 2a). The Director granted petitioner's request and assured it that it would not be "passed over" pending resolution of the dispute (Pet. App. 2a). On June 2, 1976, petitioner and GSA entered into a conciliation agreement concerning the issues raised by the March 22, 1976, show cause notice, and that notice was withdrawn (*ibid.*).

During GSA's investigation of petitioner, GSA determined that there was a group of female employees who had been adversely affected by petitioner's allegedly discriminatory employment practices. As a result, on May 14, 1976, after attempts to conciliate this matter failed, a second show cause notice was issued to petitioner (Pet. App. 2a, 40a-45a). Unlike the March 22, 1976, show cause notice, this notice did not specifically indicate that petitioner was subject to being passed over for future contracts (Pet. App. 40a-42a). Petitioner again requested the Director of the OFCCP to require that a hearing be held prior to any agency determination of nonresponsibility (Pet. App. 2a). In addition, petitioner requested

that all unresolved issues be adjudicated at a consolidated hearing (*ibid.*). On June 29, 1976, the OFCCP again granted petitioner's requests and stated that petitioner would not be passed over for any contract award before receiving a hearing on the May 14, 1976, show cause notice (Pet. App. 9a).

Petitioner instituted this suit on April 7, 1976. The initial complaint, filed the day after petitioner's first request that it be afforded a hearing prior to being found nonresponsible, challenged the March 22, 1976, show cause notice and alleged that petitioner was unlawfully being found nonresponsible without a hearing. On May 18, 1976, petitioner filed an amended complaint effectively challenging the May 14, 1976, show cause notice by alleging that the defendants were without authority to require petitioner to remedy its discriminatory actions against the affected class of female employees as a condition to continued performance of government contracts.

On March 8, 1977, the district court dismissed petitioner's complaint. The district court found that there was no justification for petitioner's failure to exhaust its administrative remedies before invoking the jurisdiction of the federal courts (Pet. App. 10a). The court noted that petitioner's challenge to the agency's attempt to obtain retrospective remedies for the class of females allegedly discriminated against by petitioner's employment practices turned on "a particular set of facts" (Pet. App. 10a-11a), and the circumstance that a legal question was involved—whether the Executive Order authorized such remedies—could neither convert the May 14, 1976, show cause order into final agency action nor justify an exception to the exhaustion doctrine (*ibid.*). In addition, the district court found that petitioner was "not being

denied government contracts without a prior hearing" (Pet. App. 12a). Thus, the court held, petitioner was not entitled to judicial intervention because it had established neither "that the administrative remedy [was] wholly inadequate nor that an attempt to exhaust such remedies would subject [petitioner] to irreparable injury" (Pet. App. 11a).

The court of appeals affirmed the district court in all respects. The court found that application of the exhaustion doctrine is particularly appropriate in this case because petitioner's "challenge is to the regulation as applied to a specific set of facts, as well as on its face, so that ultimate judicial review, if necessary, will be facilitated by a complete administrative record" (Pet. App. 4a). For similar reasons, the court rejected petitioner's contention that exhaustion was not required because it was challenging the OFCCP's regulations, the promulgation of which was "final." The court held that "since further and adequate administrative relief [respecting application of those regulations] has been requested but not exhausted" the case was not ripe for judicial review (Pet. App. 5a).

The court of appeals also affirmed the district court's finding that petitioner would not suffer irreparable injury pending adminstrative review. The court held (Pet. App. 6a):

> We agree [with the district court] that [petitioner] has made an insufficient showing of irreparable injury to justify excusing it from the exhaustion requirement, particularly where it has received specific assurances from the director of OFCCP that it will not be passed over pending resolution of the current dispute.

Petitioner's speculation that it might face injury from the issuance of show cause notices at its other facilities was rejected by the court because petitioner "will still be able to avail itself of the * * * procedure that was employed here to escape a finding of nonresponsibility pending final determination of the legal questions here presented" (*ibid.*). Finally, the court discounted petitioner's contention that it would suffer irreparable injury *if* it were unsuccessful in the administrative proceedings and *if* a stay pending judicial review were denied, because "[s]uch hypothesizing of conceivable injury is far too speculative and tenuous to mandate exemption from the normal rule [of exhaustion] at this juncture" (Pet. App. 7a).

ARGUMENT

The decisions and concurrent findings of the lower courts are correct, there is no conflict among the courts of appeals on the question presented, and further review is not otherwise warranted.

As petitioner recognizes (Pet. 6), the only issue before this Court is whether the lower courts erred in determining that petitioner was required to exhaust available administrative remedies before seeking judicial review of the application and validity of the OFCCP's regulations enforcing Exec. Order No. 11246.[6] It is settled that ordinarily "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). This doctrine, which is fully applicable to disputes between the federal government and its contractors

[6]This case thus does not present any question concerning the Executive's authority to issue Exec. Order No. 11246. See generally *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979).

(*United States* v. *Blair*, 321 U.S. 730, 734-737 (1944); see also *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963)), has been codified by Congress in the Administrative Procedure Act, which defines reviewable agency action as "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Even where agency action—*e.g.* the formulation of an agency rule—may be considered final (*Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 149 (1967)), judicial review is not warranted if the controversy is not "ripe" for adjudication. *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967). Thus judicial review of agency regulations is not appropriate where the controversy arises out of a particular attempt to enforce the rule and "further administrative proceedings are contemplated" (*Abbott* Laboratories, *Inc.* v. *Gardner, supra*, 387 U.S. at 149), where the administrative process in the context of a particular case may throw some light on the substance and "practical justifications for the regulation" (*Toilet Goods Association* v. *Gardner, supra*, 387 U.S. at 166), or where "no irremediable adverse consequences flow from requiring a later challenge" to the regulations in question (*id.* at 164; see also *Diamond Shamrock Corp.* v. *Costle*, 580 F. 2d 670 (D.C. Cir. 1978)). The ripeness requirement is necessary "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories, Inc.* v. *Gardner, supra*, 387 U.S. at 148-149.

In the present case petitioner seeks judicial review of agency regulations that agency officials have declared will not be applied to petitioner in this controversy and of other regulations that may or may not be applied to petitioner, depending on the outcome of an ongoing agency proceeding. Petitioner's challenge to 41 C.F.R. 60-2.2(b) (43 Fed. Reg. 49249-49250, 51400 (1978))—the regulation it characterizes as authorizing *de facto* contract debarment without a hearing (Pet. 8-9)—represents nothing more than an abstract disagreement with the regulation as petitioner construes it; for petitioner has twice sought and twice obtained the OFCCP's assurances that petitioner will not be passed over for any contracts before it has received a full agency hearing on the allegations that its Libby, Montana, plant is not in compliance with Exec. Order No. 11246 (Pet. App. 2a).[7] Petitioner's challenge to regulations providing for retrospective remedies for violations of the Executive Order (41 C.F.R. 60-1.26(a)(2) and 60-2.1(b) (43 Fed. Reg. 49246, 49249 (1978)) has a basis in a concrete controversy, but that controversy has yet to be resolved through the administrative process. Moreover, if it is

[7]Because both courts below found that petitioner has not shown that it has been or will be denied federal contracts without a hearing (Pet. App. 6a, 12a), it is immaterial whether, as petitioner contends (Pet. 20), it is being denied an opportunity to litigate the "pass-over" issue in the administrative hearing on the May 14, 1976, show cause notice. If the regulation is not being applied to petitioner, it has no valid claim for relief, either administrative or judicial. In petitioner's implicit attack on the concurrent factual findings of the courts below that it is not being denied government contracts without a hearing (Pet. 10), petitioner fails to demonstrate any factual errors by the courts, much less "a very obvious and exceptional showing of error" that might warrant review by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); see also *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

resolved in petitioner's favor—if, for example, it is determined that there is no past discrimination against an "affected class" of females to be remedied or that the remedies sought are otherwise inappropriate—then the controversy about the validity of the regulations in question will be moot. If the remedies are applied to petitioner, then, as the court of appeals observed (Pet. App. 4a), judicial review "will be facilitated by a complete administrative record."

In sum, because administrative proceedings involving certain of the challenged regulations are in progress, because those proceedings will produce a record that could be helpful to a court if judicial relief is ultimately required, and because petitioner has made no showing that it will suffer irreparable harm as a result of being required to exhaust its administrative remedies before seeking judicial relief, the courts below were correct in concluding that petitioner has presented no issues ripe for judicial review.[8]

[8]Petitioner is incorrect in suggesting, by its citation to *Diapulse Corp. of America* v. *FDA*, 500 F. 2d 75 (2d Cir. 1974), and *American Nursing Home Ass'n* v. *Cost of Living Council*, 497 F. 2d 909 (Temp. Emer. Ct. App. 1974) (Pet. 19), that the decision in this case conflicts with decisions of other courts of appeals. In *Diapulse*, a case concerning the authority of an agency to impose certain search fees as a condition to disclosing documents requested under the Freedom of Information Act, 5 U.S.C. 552, the court noted that there was "no administrative proceeding to interrupt, since Diapulse has chosen not to seek administrative review of the validity of the fees the FDA staff proposed"; and the court concluded that the fees were almost certainly being made a condition to disclosure of the particular documents requested. 500 F. 2d at 78. As noted, here there is an administrative proceeding in progress, and it is not known whether any of the forms of relief that petitioner claims are unauthorized will ultimately be ordered. In *American Nursing Home Ass'n* the court stated, as the applicable rule, that exhaustion of remedies is not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Assistant Attorney General

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VINCENT F. O'ROURKE, JR.
Attorneys

JUNE 1979

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essential in cases dealing "solely" with statutory interpretation. 497 F. 2d at 913. This is not such a case, for,as the court of appeals observed (Pet. App. 4a), the application of regulations to a specific set of facts, as well as purely legal issues, is involved here.

DOJ-1979-06

APPENDIX A

UNITED STATES OF AMERICA

GENERAL SERVICES ADMINISTRATION

Region 8
Federal Center
Denver, CO 80225

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR 22 1976

Mr. Douglas Kilner
Resident Manager
St. Regis Paper Company
General Delivery
Libby, Montana 59923

Dear Mr. Kilner:

A compliance review was conducted of your St. Regis Paper Company facility in Libby, Montana, on February 24, 1976, by a member of this staff. The findings reflect that your company is not in compliance with the requirements relating to equal employment opportunity. Consequently, this agency is herewith issuing this notice to show cause why enforcement proceedings under Section 209 (b) of Executive Order 11246, as amended, should not be instituted.

In connection with this notification, you are required to take steps to correct these deficiencies, as cited in the attached listing, within 30 days. Should you not correct the deficiencies within the aforementioned prescribed time period, or show cause for your failure to do so, proceedings will be initiated as required by Executive

Order 11246, as amended, and Revised Order Number 4 of the United States Department of Labor. These proceedings may include a notice of proposed cancellation or termination of existing Federal contracts or subcontracts and debarment from future contracts and subcontracts.

It is the sincere desire of this agency to continue all feasible efforts to assist you in preventing the necessity of having to take such severe action. In this regard, Mr. Richard Bowman, telephone number (303) 234-2175, will be available to confer or meet with you at any mutually agreed upon time and date. Additional conferences or meetings will not, however, extend the 30 day period, but they may expedite your attainment of compliance status.

You are hereby advised that St. Regis Paper Company, can be found non-responsible to perform any government contract until this show cause notice is finally and favorably resolved.

Sincerely,

/s/ DENNIS J. SANTISTEVAN

DENNIS J. SANTISTEVAN
Acting Regional Director
Office of Contract Compliance

Enclosure

cc:
Mr. Roy P. McCrary
EEO Coordinator
St. Regis Paper Company
P.O. Box 1593
Tacoma, Washington 98401

ATTACHMENT TO SHOW CAUSE NOTICE
DATED MARCH 22, 1976:

1. Deficiencies noted in the initial GSA, February 15, 1972, on-site review:

a) The deficiency or underutilization of women in the composition of the workforce.

2. Deficiencies identified during the February 24, 1976, on-site review:

a) The deficiency of underutilization of women continues to exist with no significant change in the female composition of the workforce, as of December 31, 1975.

b) St. Regis Paper Company, Libby, Montana, failed to exercise the corrective action necessary to achieve the established goals and execute the established equal employment opportunity policy.

c) The following comprise the basis of noncompliance with Executive Order 11246, as amended:

1) Bona fide occupational qualifications justifying a particular sex as a condition of employment have not been established, however, arbitrary standards are used to deny employment opportunity to women.

Hiring opportunity is systematically denied women by the application of arbitrary and capricious physical standards which are impossible to apply uniformly.

One such physical standard is termed "Adequate Physical Stature." As defined by the Manager of Personnel, Mr. Frank Peck, "Adequate Physical

Stature" is a minimum of 125 pounds, unless, if in the opinion of the interviewer, the applicant is wiry (appears to be able to perform the work).

2) Females have been adversely effected in selection/hiring actions. As a percent of total female laborers rejected, women were rejected for employment because of inadequate stature, at far higher proportions than men were rejected, in violation of Executive Order 11246, as amended, as implemented by Part 60-3, Title 41 Code of Federal Regulations, Section 60-3.3.

3) Employment opportunity was denied women in the recruitment and hiring of 51 temporary, summer employees. Part 60-20, 41 CFR, Section 60-20.2 (a) requires that employers must recruit from both sexes. Since only male applicants for those vacancies are on file, it is evident that St. Regis Paper Company, Libby, Montana, did not recruit women.

4) For the past five years, the number of women employed and the kinds of positions they hold, have remained virtually unchanged due to lack of good faith efforts on the part of the contractor.